Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

OHIO ADULT PAROLE AUTHORITY, et al.,
Petitioners,

v.

LARRY LYONS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BETTY D. MONTGOMERY
Attorney General

JEFFREY S. SUTTON
State Solicitor
Counsel of Record
SIMON B. KARAS
Deputy Chief Counsel
CHARLES L. WILLE
STEPHANIE L. HARRIS
Assistant Attorneys General
30 East Broad Street, 17th Fl.
Columbus, Ohio 43215-3428
(614) 466-8980

Counsel for Petitioners

83 pp

QUESTIONS PRESENTED

I.

WHETHER COURTS OF APPEALS HAVE AUTHORITY TO ISSUE CERTIFICATES OF APPEALABILITY UNDER 28 U.S.C. SECTION 2253(c)(1)(A), AS AMENDED BY THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996?

II.

WHETHER THE STANDARD FOR ISSUING A CERTIFICATE OF APPEALABILITY UNDER 28 U.S.C. SECTION 2253 REMAINS THE SAME AS THE PREVIOUS STANDARD FOR ISSUING A CERTIFICATE OF PROBABLE CAUSE?

LIST OF PARTIES

The petitioners in this action are the Ohio Adult Parole Authority, Margarette T. Ghee, Chairwoman of the Ohio Adult Parole Authority, and Anthony Brigano, Warden of the Warren Correctional Institution. The respondent in this action is Larry Lyons.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES vi

OPINIONS AND JUDGMENTS BELOW 1

JURISDICTIONAL STATEMENT 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 5

I. THE ACT VESTS FEDERAL COURTS OF APPEALS, NOT DISTRICT COURTS, WITH AUTHORITY TO ISSUE BINDING CERTIFICATES OF APPEALABILITY FROM DENIED SECTION 2254 HABEAS PETITIONS 6

A. The Decision Below Sharpens A Growing Conflict Of Authority Among The Lower Courts 6

B. The Issue Presented Is National In Scope And Vital In Nature 8

C. The Sixth Circuit Erred In Concluding That District Courts May Issue Binding Certificates Of Appealability Under The Act 8

II. THE SIXTH CIRCUIT'S OPINION ON THE STANDARD TO BE APPLIED IN GRANTING OR DENYING A CERTIFICATE OF APPEALABILITY REFLECTS CONFLICT AND CONFUSION AMONG THE CIRCUIT COURTS AS TO THE MEANING AND EFFECT OF 28 U.S.C. SECTION 2253 AND FED. R. APP. P. 22(B) AS AMENDED 11

III. IN THE EVENT THE COURT GRANTS THE WRIT ON QUESTION I OR QUESTION II, IT SHOULD CONSOLIDATE THE CASE WITH *HUNTER V. UNITED STATES*, 101 F.3d 1565 (11TH CIR. 1996), AND SET THEM BOTH FOR ARGUMENT 12

CONCLUSION 13

APPENDIX A-1

Opinion Of United States Court Of Appeals For The Sixth Circuit, Dated 1/22/97 . . . . . A-1

Order Of The United States District Court, Dated 5/1/96 . . . . . A-36

Judgment In A Civil Case Of United States District Court, Dated 3/25/96 . . . . . A-37

Opinion And Order Of The United States District Court, Dated 3/25/96 . . . . . A-38

First Circuit Interim Processing Guidelines For Certificates Of Appealability Under 28 U.S.C. Section 2253 And For Motions Under 28 U.S.C. Section 2244, Dated 9/10/96 . . . A-51

United States Court of Appeals For The Fourth Circuit Title VI. Habeas Corpus; Proceedings In Forma Pauperis, Dated 6/5/96 . . . . . A-55

United States Court Of Appeals For The Seventh Circuit Title VI. Habeas Corpus; Proceedings In Forma Pauperis, Dated 5/30/96 . . . . . A-56

Emergency General Order Of United States Court of Appeals For The Tenth Circuit, Dated 10/1/96 . . . . . A-59

TABLE OF AUTHORITIES

CASES Page

Barefoot v. Estelle,
463 U.S. 880 (1983) 9, 11

Drinkard v. Johnson,
97 F.3d 751 (5th Cir. 1996) 11

Else v. Johnson
1997 U.S. App. LEXIS 3262
(5th Cir. 1997) 7

Felker v. Turpin,
__ U.S. __, 116 S. Ct. 2333 (1996) 8

Henderson v. United States,
__ U.S. __, 116 S. Ct. 1638 (1996) 10

Herrera v. United States,
96 F.3d 1010 (7th Cir. 1996) 11

Hohn v. United States
99 F.3d 892 (8th Cir. 1996) 7

Houchin v. Zavaras,
924 F.Supp. 115 (D. Colo. 1996) 7

Hunter v. United States,
101 F.3d 1565 (11th Cir. 1996) 7, 11, 12

Landgraf v. USI Film Prods.,
511 U.S. 244 (1994) 5, 12

CASES

Page

Lennox v. Evans,
87 F.3d 431 (10th Cir. 1996) 11

Lindh v. Murphy,
96 F.3d 856 (7th Cir. 1996),
cert. granted, 117 S. Ct. 726 (1997) 12

Lozada v. United States,
__ F.3d __ (2nd Cir. March 7, 1997) 7

Lyons v. Ohio Adult Parole Authority,
__ F.3d __, 1997 WL 20401
(6th Cir. 1997) 1, 11

Madison v. Marbury,
5 U.S. 137 (1803) 10

Parker v. Norris,
929 F.Supp. 1190 (E.D. Ark. 1996) 7

Reyes v. Keane,
90 F.3d 676 (2d Cir. 1996) 11

Rivers v. Roadway Express, Inc.,
511 U.S. 298 (1994) 12

Santana v. United States,
98 F.3d 752 (3d Cir. 1996) 12

United States v. Asrar,
1997 U.S. App. LEXIS 3683 (9th Cir. 1997) . . 7

CASES Page

United States v. Sasser,
971 F.2d 470 (10th Cir. 1992),
cert. denied, 507 U.S. 924 (1993) 10

Vacco v. Quill,
__ U.S. __, 117 S. Ct. 36 (1996) 12

Washington v. Glucksberg,
__ U.S. __, 117 S. Ct. 37 (1996) 12

Williams v. Calderon,
83 F.3d 281 (9th Cir. 1996) 11

CONSTITUTIONAL AND STATUTORY PROVISIONS

28 U.S.C. 2253 . . . . . passim

28 U.S.C. 2254 . . . . . passim

MISCELLANEOUS AUTHORITIES

Fed. R. App. P. 22 . . . . . passim

First Circuit Rule 22.1(b) 6

Fourth Circuit Rule 22(a) 7

Seventh Circuit Rule 22.1(b) 6

Tenth Circuit Emergency General Order 7

OPINIONS AND JUDGMENTS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit, entered on January 22, 1997, is reported. *Lyons v. Ohio Adult Parole Authority*, __ F.3d __, 1997 WL 20401 (6th Cir. 1997). (A-1). The order of the United States District Court for the Southern District of Ohio, Eastern Division, granting a certificate of probable cause to appeal, entered on May 1, 1996, is unreported. (A-36). The judgment and order of the district court denying relief in habeas corpus, entered on March 25, 1996, also is unreported. *Larry Lyons v. Ohio Adult Parole Authority*, Case No. C295542. (A-37 and A-38).

JURISDICTIONAL STATEMENT

The opinion of the United States Court of Appeals for the Sixth Circuit was entered on January 22, 1997. (A-1). Jurisdiction exists under 28 U.S.C. section 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions at issue are sections 102 and 103 of the Antiterrorism and Effective Death Penalty Act of 1996, (the "Act"). Section 102 of the Act amends 28 U.S.C. section 2253 to read as follows:

> (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> (b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or

> place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.
>
> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--
>
> > (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
> >
> > (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under Paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Section 103 of the Act amends Fed. R. App. P. 22 to read as follows:

> Rule 22. Habeas corpus and section 2255 proceedings

(a) APPLICATION FOR THE ORIGINAL WRIT- An application for a writ of habeas corpus shall be made to the appropriate district court. If application is made to a circuit judge, the application shall be transferred to the appropriate district court. If an application is made to or transferred to the district court and denied, renewal of the application before a circuit judge shall not be permitted. The applicant may, pursuant to section 2253 of title 28, United States Code, appeal to the appropriate court of appeals from the order of the district court denying the writ.

(b) CERTIFICATE OF APPEALABILITY- In a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court, an appeal by the applicant for the writ may not proceed unless a district or a circuit judge issues a certificate of appealability pursuant to section 2253(c) of title 28, United States Code. If an appeal is taken by the applicant, the district judge who rendered the judgment shall either issue a certificate of appealability or state the reasons why such a certificate should not issue. The certificate or the statement shall be forwarded to the court of appeals with the notice of appeal and the file of the proceedings in the district court. If the district judge has denied the certificate, the applicant for the writ may then request issuance of the certificate by a circuit judge. If such a request is addressed to the court of appeals, it shall be deemed addressed to the judges thereof and shall be

> considered by a circuit judge or judges as the court deems appropriate. If no express request for a certificate is filed, the notice of appeal shall be deemed to constitute a request addressed to the judges of the court of appeals. If an appeal is taken by a State or its representative, a certificate of appealability is not required.

STATEMENT OF THE CASE

This dispute stems from a judgment of the United States District Court, Southern District of Ohio, Eastern Division, issued on March 25, 1995, rejecting respondent Larry Lyons' petition for a writ of habeas corpus under 28 U.S.C. 2254. (A-37 and A-38). On April 24, 1996, Lyons filed a notice of appeal to the Sixth Circuit Court of Appeals, and requested a certificate of probable cause from the district court. That same day, President Clinton signed into law Title I of the Antiterrorism and Effective Death Penalty Act of 1996 (the "Act"), which amended among other sections 28 U.S.C. 2254 and added chapter 154 to Title 28 of the United States Code.

On May 1, 1996, the district court granted Lyons' request for a certificate of probable cause to appeal to the Sixth Circuit. (A-36). On June 6, 1996, the Sixth Circuit *sua sponte* ordered Lyons, represented by the federal Public Defender, and petitioners, represented by the Ohio Attorney General, to file simultaneous briefs on July 10, 1996, regarding an apparent conflict between the post-Act requirements under 28 U.S.C. 2253 and Federal Rule of Appellate Procedure 22(b) for obtaining a certification of appealability from the denial of a section 2254 federal habeas petition. On October 16, 1996, the Sixth Circuit heard oral argument concerning these and other issues in the case.

On January 22, 1997, the Sixth Circuit issued its decision. The court first asked whether the certificate-of-appealability amendments to the Act apply to petitions, like respondent's, that were filed before passage of the Act. In accordance with *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), the court concluded that the procedural and jurisdictional changes to habeas law, like "most . . . new laws which affect only procedure or jurisdiction," were "not impermissibly retroactive" and therefore applied to pending cases. (A-25). The court then addressed whether the Act gave the district courts, or the courts of appeals, authority to issue binding certificates of appealability. In addressing this question, the court acknowledged the inescapable tension between Rule 22 and section 2253, as amended by the Act, (A-10), then concluded that district courts continued to have authority to issue certificates of appealability in spite of the Act. (A-22). Finally, the court concluded that the threshold standard for obtaining a certificate of appealability remained the same as pre-Act law. (A-23). In light of these conclusions and the district court's original decision to issue a "certificate of probable cause," the court remanded the case to allow the district court to issue a proper certificate of appealability.

REASONS FOR GRANTING THE WRIT

The decision below reads like a petition for a writ of certiorari. In page after page of the opinion, the Sixth Circuit candidly acknowledges the difficulty of reconciling Rule 22 with section 2253 after passage of the Act, the problems other circuits are having with the issue, and the number of conflicting decisions and intra-circuit rules that have been issued on point. By itself, this factor would seem to warrant granting the writ.

But other reasons exist for granting the writ as well. The question presented is one of great magnitude in at least two respects: It arises in thousands of cases a year (*i.e.*, affecting all section 2254 petitions denied by a district court); and it potentially dilutes one of the most important objectives of the Act (*i.e.*, streamlining habeas review of state-court criminal convictions). Finally, the case presents a separate question of great importance -- whether the Act alters the threshold showing (either to the district or circuit court) for obtaining a certificate of appealability.

I. THE ACT VESTS FEDERAL COURTS OF APPEALS, NOT DISTRICT COURTS, WITH AUTHORITY TO ISSUE BINDING CERTIFICATES OF APPEALABILITY FROM DENIED SECTION 2254 HABEAS PETITIONS.

A. The Decision Below Sharpens A Growing Conflict Of Authority Among The Lower Courts.

To its credit the Sixth Circuit forthrightly acknowledged the wide array of interpretations that have been offered to reconcile the apparent conflict between Rule 22 and section 2253, as well as the difficulty of providing its own answer to the question.

The court initially noted the different treatment given to the issue by rule. It pointed (A-11 - A-13), to different local rules adopted by the First and Seventh Circuits: The First Circuit allows district courts to issue advisory, but not binding, certificates of appealability, *see* First Circuit Rule 22.1(b); the Seventh Circuit allows district courts to issue binding certificates of appealability, *see* Seventh Circuit Rule

22.1(b). (A-51 and A-56). More recently, other circuits have drafted rules concerning the issue. While the Tenth Circuit now permits district courts to issue binding certificates of appealability, *see* Tenth Circuit Emergency General Order, effective October 1, 1996, (A-59), the Fourth Circuit allows only the court of appeals to do so, *see* Fourth Circuit Rule 22(a). (A-55).

This split of authority is highlighted by decisions from other circuits. On one side, several appellate courts have held that district court judges may issue binding certificates of appealability under the Act. *See Ohio Adult Parole Authority v. Lyons*, (6th Cir. Jan. 22, 1997) (A-1); *Hunter v. United States*, 101 F.3d 1565 (11th Cir. 1996) (*en banc*); *Else v. Johnson*, 1997 U.S. App. LEXIS 3262 (5th Cir. 1997); *United States v. Asrar*, 1997 U.S. App. LEXIS 3683 (9th Cir. 1997); *Lozada v. United States*, __F.3d__ (2nd Cir. March 7, 1997). On the other side, one appellate court has held that district courts judges may not issue binding certificates of appealability. *See Hohn v. United States*, 99 F.3d 892 (8th Cir. 1996). The issue also is pending in four cases in the Third Circuit. *See Johnston v. Love*, No. CA961715; *United States v. Eyer*, No. CA967310; *Johnson v. Rosemeyer*, No. CA961861; *Banks v. Horn*, No. CA969003. Not surprisingly, in view of these differences of opinion, the district courts themselves initially interpreted the Act differently. *See Houchin v. Zavaras*, 924 F.Supp. 115, 117 (D. Colo. 1996) (district courts may issue binding certificates of appealability); *Parker v. Norris*, 929 F.Supp. 1190 (E.D. Ark. 1996) (only courts of appeals may issue binding certificates of appealability).

This conflict of authority, which awaits input from just two more circuits, (the Third and D.C. Circuits), merits prompt review by the Court. In short, the Sixth Circuit's invitation for "clarification of this statutory conflict" (A-23)

ought to be accepted.

B. The Issue Presented Is National In Scope And Vital In Nature.

In addition to the irreconcilable conflict of authority among the lower courts on this matter, the issue presented is important for at least two other reasons. First, the issue has arisen with great frequency since the Act became law on April 24, 1996, and will continue to do so until it is resolved. The reason is straightforward: The procedure for issuing a certificate of appealability arises every time a district court denies a section 2254 habeas petition, and the petitioner chooses to appeal. At a minimum, that involves thousands of cases per year.

Second, the procedure at issue goes to the heart of the Act's overriding goal of streamlining habeas review of state-court criminal convictions. Failure to resolve this issue not only creates continued uncertainty in the lower courts but also threatens to dilute the objectives of the Act. Indeed, last Term in *Felker v. Turpin*, ___ U.S. ___, 116 S. Ct. 2333 (1996), the Court ordered accelerated briefing and argument of an issue of comparable import.

C. The Sixth Circuit Erred In Concluding That District Courts May Issue Binding Certificates Of Appealability Under The Act.

As a final matter, the Sixth Circuit erred in concluding that the certificate-of-appealability procedure outlined in Rule 22 trumps the procedure provided in section 2253. While the Sixth Circuit properly identified the

linguistic tension in the Act, the court improperly resolved it. The tension is this: After the Act, section 2253(c)(1) says that no appeal is allowed "[u]nless a circuit justice or judge issues a certificate of appealability," while Rule 22 of the Federal Rules of Appellate Procedure says that no appeal is allowed "unless a district or a circuit judge issues a certificate of appealability." Both the rule and the statute were amended under the Act.

The Sixth Circuit found that the apparent conflict could be resolved by reading section 2253 to mean that "a circuit justice or *a* judge" could grant a certificate of appealability. (A-15). This would allow any Article III judge with authority in the circuit -- from the U.S. Supreme Court, to the Court of Appeals, to the District Court -- to issue the required certificate and at the same time would apparently honor the language of Rule 22. The Sixth Circuit was agnostic about this interpretation, (A-15) (acknowledging that it was a "possible," but "tortured," reading), and respectfully should have been. The court offered no tenable reason why it is appropriate to add language to section 2253 as opposed to subtracting language from Rule 22, except to say that under the former reading one "need only modify the punctuation" of section 2253 while under the alternative reading more words in Rule 22 would have to be ignored. (A-16). No such rule for ascertaining congressional meaning exists. Words and grammar go hand in hand: One without the other is meaningless; and favoring one necessarily slights the other.

Two other alternatives make more sense. First, it is appropriate to ask whether the court's interpretation meaningfully changes pre-Act law. Prior to April 24, 1996, state prisoners whose habeas petitions were denied in federal district court had to obtain a certificate of probable cause before appealing that denial. *See Barefoot v. Estelle*, 463 U.S. 880, 892-93 (1983). After the Act, if one adopts the

Sixth Circuit's view, little has changed, despite the multi-decade effort to alter this component of pre-Act law. In truth, this interpretation would permit and honor one change. Instead of calling the gatekeeping function a "certificate of probable cause," the amendment calls it a "certificate of appealability." It seems odd, however, to conclude that a central compromise reached in amending this area of the law was simply to substitute a new name for an old procedure. It would make more sense to conclude that Congress's decision to rename the procedure followed from its decision meaningfully to alter the procedure. That would require adhering to the changes to section 2253, which plainly place authority for issuing binding certificates of appealability in the hands of circuit judges and justices. *But see* 28 U.S.C. 2253(c)(2) & (3).

A second angle supports this view. The law has long depended on hierarchies for resolving conflicts of authority. *Marbury v. Madison*, 5 U.S. 137 (1803) is the most obvious example in the area of interpreting the Constitution. A similar hierarchy applies, or at least ought to apply, in reading Acts of Congress. When Congress amends a jurisdictional statute and a rule in opposite directions, it is fair to dignify the statutory change before the rule change. Congress necessarily can be assumed to place more focus on statutory amendments concerning jurisdiction because rules have long been used merely to implement statutes, not to overcome them. *See United States v. Sasser*, 971 F.2d 470, 473 (10th Cir. 1992), *cert. denied*, 507 U.S. 924 (1993); *cf. Henderson v. United States*, __U.S.__, 116 S. Ct. 1638 (1996).

II. THE SIXTH CIRCUIT'S OPINION ON THE STANDARD TO BE APPLIED IN GRANTING OR DENYING A CERTIFICATE OF APPEALABILITY REFLECTS CONFLICT AND CONFUSION AMONG THE CIRCUIT COURTS AS TO THE MEANING AND EFFECT OF 28 U.S.C. SECTION 2253 AND FED. R. APP. P. 22(B) AS AMENDED.

Similarly, the Sixth Circuit's decision in *Lyons v. Ohio Adult Parole Authority*, __ F.3d __, 1997 WL 20401, (6th Cir. 1997), added to the confusion among the circuit courts regarding the standard to be applied when granting a certificate of appealability. The Circuit held that the Act "merely codifie[d]" the previous "substantial showing of the denial of a federal right" of *Barefoot v Estelle*, 463 U.S. 880, 893 (1983) before a certificate would issue. (A-23). *Accord, Reyes v. Keane*, 90 F.3d 676, 680 (2d Cir. 1996); *Drinkard v. Johnson*, 97 F.3d 751,756 (5th Cir. 1996); *Herrera v. United States*, 96 F.3d 1010, 1012 (7th Cir. 1996); *Lennox v. Evans*, 87 F.3d 431,434 (10th Cir. 1996).

However, at least two circuits have indicated that the standard is more demanding than the pre-Act showing. The Ninth Circuit, in *Williams v. Calderon*, 83 F.3d 281, 286 (9th Cir. 1996), found that the standard for obtaining a certificate of appealability under the Act is "more demanding" than the *Barefoot* standard for the previous certificate of probable cause. Likewise, the Eleventh Circuit determined that the Act "raised the hurdle for obtaining the certificate that is a prerequisite to an appeal from the denial of relief." *Hunter v. United States*, 101 F.3d 1565, 1571, n.4 (11th Cir. 1996). The Third Circuit perhaps best summarized the confusion that currently exists among the

circuits on this issue as "[i]t is undecided whether Congress intended to change the standard, along with the name, for granting a certificate of appealability." *Santana v. United States*, 98 F.3d 752, 757 (3rd Cir. 1996).

III. IN THE EVENT THE COURT GRANTS THE WRIT ON QUESTION I OR QUESTION II, IT SHOULD CONSOLIDATE THE CASE WITH *HUNTER V. UNITED STATES*, 101 F.3d 1565 (11TH CIR. 1996), AND SET THEM BOTH FOR ARGUMENT.

In the event the Court views either question as warranting certiorari, two other factors merit attention. First, Alabama filed a petition on the first issue this week as well. *See Hunter v. United States*, 101 F.3d 1565 (11th Cir. 1996) (*en banc*). Second, the *Hunter* case and this one implicate a potential cross-petition on the retroactivity of this portion of the Act, an issue that has some similarity to the question presented in *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996), *cert. granted,* 117 S. Ct. 726 (1997), now pending before the Court.

On the first point, we respectfully submit that the importance of the issue presented, together with differences between *Hunter* and this action, warrant setting them both for argument and for consolidating them. *See Vacco v. Quill*, ___U.S.___,117 S. Ct. 36 (1996) and *Washington v. Glucksberg* __U.S.__, 117 S. Ct. 37 (1996); *Landgraf v. USI Film Products,* 511 U.S. 244 (1994) and *Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994). The *Hunter* case presents certificate of appealability issues both for section 2254 and section 2255 appeals, while this case just presents the issue in the context of state prisoners. Second, this petition separately raises the question whether the pre-

Act standard for granting a certificate has changed.

On the second point, and assuming a cross-petition on the retroactivity issue, it may make sense to hold the petition for the Court's decision in *Lindh*. The only problem with this approach is it will further delay resolution of the certificate-of-appealability question. As shown earlier, the circuits are in dire need of clarification on this point, as are State Attorney General offices, the Justice Department, and habeas petitioners.

CONCLUSION

For the foregoing reasons, petitioners respectfully request the Court to grant the writ.

Respectfully submitted,

BETTY D. MONTGOMERY
Attorney General of Ohio

JEFFREY S. SUTTON
State Solicitor
Counsel of Record
SIMON B. KARAS
Deputy Chief Counsel
CHARLES L.WILLE
STEPHANIE L. HARRIS
Assistant Attorneys General
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215-3428
(614) 466-8980

Counsel for Petitioners

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LARRY LYONS,
Petitioner-Appellant,

v.

OHIO ADULT PAROLE AUTHORITY, et al.,
Respondents-Appellees.

ON APPEAL from the United States District Court for the Southern District of Ohio

Decided and Filed January 22, 1997

Before: JONES, RYAN, and MOORE, Circuit Judges.

MOORE, J., delivered the opinion of the court, in which JONES, J., joined. RYAN, J. (pp. 29-32), delivered a separate concurring opinion.

KAREN NELSON MOORE, Circuit Judge. Petitioner-Appellant Larry Lyons appeals the denial of his habeas corpus petition. This appeal requires that we, for the first time, interpret several provisions of the recent statutory amendments to the federal habeas corpus framework. As explained below, we hold that district courts have the power to issue certificates of appealability under the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified, inter alia, at 28 U.S.C. §2244 et seq.) [hereinafter "AEDPA" or "the Act"]. Because the district court's certificate of probable cause failed to comply with the requirements for certificates of appealability under the Act, we remand the case to the district court to issue a

new certificate of appealability.

I. FACTS AND PROCEDURAL HISTORY

In 1984, Lyons was convicted in Ohio state court of aggravated robbery and sentenced to ten-to-twenty-five years imprisonment. Ten years later, in May 1994, Lyons was paroled. His freedom was short-lived: in June he was arrested for attempted petty theft. He quickly posted bond but, when he failed to appear in court to answer the charge, the state declared him a parole-violator-at-large. On August 3, Lyons was again arrested, and charged with theft and obstructing official business. This time, he was not released on bond; he has been incarcerated ever since. Instead, he was notified that he was in danger of having his parole revoked because of the theft charges and for failing to return to his halfway house.

Lyons pleaded guilty to all three offenses—theft, petty theft, and obstruction—and did not challenge them on direct appeal. He received thirty days in jail for one offense and suspended sentences for the other two. Meanwhile, the Ohio Adult Parole Authority was moving to revoke Lyons's parole. In August Lyons had signed a form waiving his right to an "on-site" revocation hearing; the form stated that this hearing would occur within sixty days or, if Lyons was "unavailable," within a reasonable time. Lyons became "available" to the Parole Authority when he was sentenced for the misdemeanors[1] on October 6, an event which had

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[1]"A declared adult parole violator is 'available for return' within the meaning of [Ohio Rev. Code. §] 2967.15 when 'no action by the state is necessary to locate or take into custody a parole violator, other than one who is incarcerated on another charge in the institution from which he was paroled.'" *In re Smith*, 513 N.E. 2d 1387, 1389 (Ohio Ct. App. 1986) (Citation

little immediate effect in his life: he remained in the county jail until November 4, when he was transferred to the state prison in Orient, Ohio.

Soon after arriving at the prison in Orient, Lyons began challenging the revocation of his parole. On November 8 he filed an administrative motion asking that the revocation be set aside. The next month, he filed an action in mandamus, or in the alternative for a writ of habeas corpus, in the Ohio Supreme Court, alleging that the state's failure to grant him a final parole revocation hearing within sixty days of his arrest violated a "protected liberty interest." Dist. Ct. Order at 3. Lyons attempted to amend his original pleading, but failed to get the requisite permission to do so. The Ohio Supreme Court dismissed the action without opinion on January 18, 1995.

On January 5, 1995, Lyons was finally given a formal parole hearing. The parole board revoked his probation based purely on the three misdemeanor convictions but dismissed the parole violations based on uncharged conduct. His case was continued until 1999. Lyons then asked a state appeals court for permission to take a delayed appeal of his misdemeanor convictions, asking to withdraw his guilty pleas. This request and a subsequent motion for reconsideration were denied. Dist. Ct. Order at 4.

In May 1995, Lyons filed this petition for habeas corpus. The initial and supplemental petitions raised six claims for relief.[2] The district court found three of these to

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omitted).

[2]Lyon's six claims are:

1. The courts which accepted Lyons's guilty misdemeanor

be procedurally barred, because Lyons had failed to raise them in his state habeas petition. *Id.* at 7. The court found the other three claims meritless and denied the writ on March 25, 1996. *Id.* at 12. On April 21, 1996, Lyons delivered his notice of appeal and request for a certificate of probable cause[3] to a prison official to file with the court. The district court issued a certificate of probable cause for the appeal on May 1, nearly a week after President Clinton signed the Antiterrorism and Effective Death Penalty Act of 1996 on

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pleas failed to advise him of the nature of the charges against him or to warn him that guilty pleas could result in parole revocation.

2. He received ineffective assistance of counsel in the misdemeanor trials.

3. Under Ohio law, the parole authority lost jurisdiction over him when it failed to provide a revocation hearing within the sixty days specified in the notice it sent him.

4. The parole authority violated his due process rights by notifying him that he would have a revocation hearing within 60 days, but not providing one for more than 100 days.

5. The parole authority lacked jurisdiction to hold the final hearing while Lyons's challenge to the authority's jurisdiction was pending in the state supreme court.

6. The revocation of Lyons's parole violated his equal protection rights, because similarly situated parolees did not suffer revocation. Dist. Ct. Order at 5; Petition for Writ of Habeas Corpus at 5 and Supp. Pleadings.

[3]The Act changed the name of the required document from "certificate of probable cause" to "certificate of appealability." *Compare* 28 U.S.C. § 2253(c)(1) *and* FED. R. APP. P. 22(b) *with* 28 U.S.C. § 2253 (1995) *and* FED. R. APP. P. 22(b) (1995). *See* part III, *infra*.

April 24.[4]

II. JURISDICTION AND STANDARD OF REVIEW

The district court had jurisdiction over this habeas petition by a state prisoner under 28 U.S.C. § 2254(a). Lyons is currently imprisoned because his parole was revoked. The essence of his claim is that the misdemeanor convictions which led to this revocation are constitutionally invalid and that his revocation hearing violated his Due Process rights. To the extent these legal claims have merit, Lyons is "in custody in violation of the Constitution . . . of the United States." 28 U.S.C. § 2254(a). *See Ex Parte Hull*, 312 U.S. 546, 550 (1941) (where petitioner's "parole was revoked and he was ordered to serve out his first sentence only because of the second conviction," he could challenge that second conviction in federal habeas petition); *Peyton v. Rowe*, 391 U.S. 54, 67 (1968) ('[T]his Court has held that a prisoner whose first-sentence parole was revoked upon a second conviction could challenge the second

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[4]Although the filing of a notice of appeal would usually divest the district court of jurisdiction over the case, it is apparently not uncommon for district courts to issue the certificate after the notice of appeal has been filed. *See Wilson v. O'Leary*, 895 F.2d 378, 382 (7th Cir. 1990) ("In cases decided initially by the district judge, FED. R. APP. P. 22(b) requires an appellant to seek a [certificate of probable cause] from the district judge, commonly done after filing the notice of appeal; district judges' actions on CPCs cannot be thought blocked by the notice of appeal."); *Latella v. Jackson,* 817 F.2d 12, 13 (2d Cir. 1987) ("[T]he more appropriate procedure for [appealing the denial of habeas petition] is for an applicant to take an appeal by filing a timely notice of appeal, seek a certificate of probable cause, and then proceed with the appeal."); *Fabian v. Reed*, 707 F.2d 147, 148-49 (5th Cir. 1983) (noting that certificate may be sought from district court after notice of appeal filed).

conviction in a habeas corpus proceeding though he would not be released if he prevailed.") (citing ***Hull***); *Brewer v. Dahlberg*, 942 F.2d 328, 334 (6th Cir. 1991). The district court determined that Lyons had exhausted his state-law remedies, and the state does not question this determination. *See* 28 U.S.C. § 2254(b) (exhaustion requirement).

This court has jurisdiction over the district court's final order under 28 U.S.C. §§ 1291, 2253. All of the novel issues presented by the Act are purely legal, and are thus reviewed de novo. *United State v. Spinelle*, 41 F.3d 1056, 1057 (6th Cir. 1994).

III. ANALYSIS

The timing of Lyons's appeal makes this case more complicated than it would otherwise be. In order to prevent frivolous appeals, Congress has long required that state prisoners whose habeas corpus petitions are denied in federal district court obtain a certificate of probable cause before appealing that denial. *See Barefoot v. Estelle*, 463 U.S. 880, 892-93 (1983). When Lyons applied for a certificate of probable cause, it was well settled that a district court could grant such a certificate and that if it did issue one a prisoner could then appeal every claim raised in his petition to this court. *See Houston v. Mintzes*, 722 F.2d 290, 293 (6th Cir. 1983) ('the grant of the certificate of probable cause by the district court, in spite of its purported limiting provision [in this case], brings before us the final judgment for review in all respects"). After the passage of the AEDPA, however, neither of these propositions is necessarily true: the Act requires that certificates of appealability "indicate which specific issue or issues" are found to be appealable, 28 U.S.C. § 2253(c)(3), and there is a question whether the Act divests district courts of the authority to issue any such certificates. *Compare* 28 U.S.C. § 2253(c)(1) (no appeal

allowed "[u]nless a circuit justice or judge issues a certificate of appealability") *with* FED. R. APP. P. 22(b) (appeal "may not proceed unless a district or a circuit judge issues a certificate of appealability"). Before we can address the petitioner's merits, then, we must decide whether to apply these provisions of the AEDPA to this case.

The Supreme Court has provided the framework for this retroactivity analysis:

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, . . . it does not govern absent clear congressional intent favoring such a result.

Landgraf v. USI Film Prods., 511 U.S. 244, 280 (1994). Thus, we must first look to the statute's text for an expression that the AEDPA should, or should not, apply to pending cases. Absent an expression by Congress of the statute's proper reach, we must determine what change, if any, the new legislation makes to the controlling law. We must then decide whether applying the new law to the pending case would have an impermissible retroactive effect

by impairing a party's rights when he acted or imposing new liabilities or duties with respect to past conduct. *See id.* at 270 ("The conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event.").

A. Effective Date and Retroactivity

As a preliminary matter, we hold that the act took effect on April 24, 1996. "It is well established that, absent a clear direction by Congress to the contrary, a law takes effect on the date of its enactment." *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991). There is nothing in AEDPA which can be construed as a "clear direction" that this should not be the case. *See Qasguargis v. INS*, 91 F.3d 788, 789 (6th Cir. 1996) (order) ("No specific effective date was provided for [the relevant AEDPA provision,] § 440(a), and it accordingly took effect upon the date of enactment."); *Reyes v. Keane*, 90 F.3d 676, 679 (2d Cir. 1996) (applying AEDPA certificate of appealability provision to pending non-capital state-habeas case); *Hatch v. Oklahoma*, 92 F.3d 1012, 1014 n.2 (10th Cir. 1996) (assuming, an absence of explicit "effective date," that AEDPA was effective when enacted).

The next question—whether Congress expressed any clear intent that the relevant parts of the new law be applied to pending cases—is only slightly more difficult. Section 107(c) of the Act states that § 107(a) applies to pending capital cases; Lyons asks us to infer from this that the Act does not apply to pending non-capital cases. We reject this line of reasoning for several reasons. First, this type of negative inference argument presupposes a well-crafted piece of legislation, which the AEDPA is not. *See United States v. Bass*, 404 U.S. 336, 343-344 (1971) (rejecting argument

based on structure of other legislation where amendment in question was "hastily passed" and thus could not be expected to "dovetail neatly" with other provisions of law); Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 Buff. L. Rev. 381, 381 (1996) (hereinafter "*New Habeas Corpus*") ("The new law is not well drafted.").[5] Second, it is likely that "the specification of applicability to pending cases in section 107 reflects only Congress's explicit concern as to death penalty cases, and carries no negative implication as to other habeas cases." *Reyes*, 90 F.3d at 679.[6] Finally, Lyons's argument here is similar to, but weaker than, the one which the Supreme Court rejected in *Landgraf*. *See Landgraf*, 511 U.S. at 259 (rejecting argument that "because

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[5]Professor Yackle continues: "[The AEDPA] bears the influence of various bills that were fiercely debated for nearly forty years. . . . The result, I am afraid, is extraordinarily arcane verbiage that will require considerable time and resources to sort out." *Id.*

[6]*See, e.g.*, Statement by President William J. Clinton upon Signing S. 1965 (1996), *reprinted in* 1996 U.S.C.A.A.N. 961-1 ("I have long sought to streamline Federal appeals for convicted criminals sentenced to the death penalty."); 141 CONG. REC. S4590-93 (daily ed. March 24, 1995) (statement of Sen. Specter, co-sponsor of Act) (bill designed to address "one of the most serious aspects of the crime problem: the interminable appeals process that has made the death penalty more a hollow threat than an effective deterrent"); 141 CONG. REC. H1400 (daily ed. Feb. 8, 1995) (statement of Rep. McCollum) (intended to "curtail[] the seemingly endless appeals of death-row inmates" while maintaining "full constitutional protections"); *id.* at H1402 (statement of Rep. Young) (intended to "create consistent and fair procedures for [death penalty] application, and to streamline the current appeals process"). *See also* Yackle, *New Habeas Corpus* at 448 (Congress passed Act "primarily to make procedural adjustments meant to streamline and expedite the processing of cases").

Congress provided specifically for prospectivity in two places. . . . we should infer that it intended the opposite for the remainder of the statute"). No other provision in the AEDPA intimates whether the Act should apply to pending cases. Thus, there is no clear statement from Congress regarding the Act's proper reach.

B. Effect of the New Law on Authority to Issue Certificates of Appealability

Before we can decide whether applying the new habeas appellate procedure to Lyons's petition would have retroactive effect, we need to determine what this new law is. The major question here is whether, under the AEDPA, district courts have the authority to issue certificates of appealability. As usual, we begin our analysis with the text of the statute.

The Act's two provisions governing the issuance of certificates of appealability are in direct conflict with each other. Section 102 of the Act provides that "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from . . . the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court." AEDPA § 102, codified at 28 U.S.C. § 2253(c)(1). However, Federal Rule of Appellate Procedure 22(b), as amended by section 103 of the Act, expressly allows district judges to issue certificates of appealability, and sets out the procedure for issuance in considerable detail.[7] The text of the Act thus presents us with a rare but

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[7]FED. R. APP. P. 22(b) as amended by § 103 of the Act provides "Certificate of Appealability—In a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court, an appeal by the applicant for the

difficult form of ambiguity: two parts of the same statute seem to require quite different procedures for appeal. Our task, then, is to decide which of these procedures is the one intended by Congress.

1. Prior Rule Making and Case Law

The only two circuits which have as yet resolved this inconsistency have done so by rule making rather than adjudication.[8] The First and Seventh Circuits have both

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writ may not proceed unless a district or a circuit judge issues a certificate of appealability pursuant to section 2253(c) of title 28, United States Code. If an appeal is taken by the applicant, the district judge who rendered the judgment shall either issue a certificate of appealability or state the reasons why such a certificate should not issue. The certificate or the statement shall be forwarded to the court of appeals with the notice of appeal and the file of the proceedings in the district court. If the district judge has denied the certificate, the applicant for the writ may then request issuance of the certificate by a circuit judge. If such a request is addressed to the court of appeals, it shall be deemed addressed to the judges thereof and shall be considered by a circuit judge or judges as the court deems appropriate. If no express request for a certificate is filed, the notice of appeal shall be deemed to constitute a request addressed to the judges of the court of appeals. If an appeal is taken by the State or its representative, a certificate of appealability is not required."

[8]After this opinion was drafted, the Eleventh Circuit concluded, as we do, that under the AEDPA district courts have the authority to issue certificates of appealability, and that the certificate of appealability provisions apply to pending § 2254 cases, at least in that case where no application for a certificate was filed before the Act's effective date. *Hunter v. United States*, ____F.3d____, 1996 WL 706706 (11th Cir. Dec. 10, 1996) (en banc).

promulgated circuit rules allowing district courts to issue certificates of appealability and in fact requiring that petitioners apply initially to the district court, rather than to the court of appeals, for such certificates. 1st CIR. R. 22.1(b) (Interim Rule) ("In this circuit, ordinarily neither the court nor a judge thereof will initially receive or act on a request for a certificate of appealability if the district judge who refused the writ is available unless an application has first been made to the district court judge."); 7th CIR. R. 22.1(b) ("every request for a certificate of appealability must be made initially to a judge of the district court."). In the Seventh Circuit, the district court's issuance of a certificate of appealability allows the appeal to go forward. The First Circuit, however, has adopted a mandatory two-step process and requires that "[o]nce the district court *grants or denies* a certificate of appealability, the petitioner should promptly apply to the court of appeals for issuance of a certificate of appealability." 1st CIR. R. 22.1(c) (Interim Rule) (emphasis added). It is only this second certificate of appealability, issued by the circuit court, which allows an appeal. *Id.* ("The effect of a denial is to terminate the appeal."). The two circuits' new local rules thus give conflicting answers to the question before us.

Both courts emphasize that their respective local Rules 22.1 do not necessarily embody the procedure which Congress intended in the AEDPA. *See* 1st CIR. R. 22.1 Interim Processing Guideline I(B) ("In adopting this two-step process as an interim measure, we do not now finally determine how any ambiguity in the amendments will be interpreted, but rather leave the matter for comment during the rule making process, 28 U.S.C. § 2071, or development in the course of litigation."); 7th CIR. R. 22.1 1996 Note ("Because some potential for doubt remains, however, the new Circuit Rule 22.1(c) calls on every district judge to take a position on the merits, even if the judge believes that the

new § 2253(c)(1) deprives the district court of the ability to issue a certificate."). The local Rules are instead meant to allow habeas appeals to proceed in an orderly manner until the question can be settled more firmly. Since we have decided to try to provide a resolution to this quandary through adjudication, we take note of our sister circuits' provisional solutions and continue our analysis.

The district courts that have examined this issue squarely have arrived at conflicting decisions. For example, in *Houchin v. Zavaras*, 924 F. Supp. 115, 117 (D. Colo. 1996), the court held that it did have the authority to issue a certificate of appealability, on the grounds that Rule 22 specifically addressed district courts and authorized them to issue certificates of appealability, whereas § 2253 "applied by its wording only to circuit justices and judges," and does not prohibit district judges from issuing certificates. This reading of § 2253, however, does not address the question of whether a certificate of appealability issued by the district court gives us jurisdiction over the appeal. *See* 28 U.S.C. § 2253(c)(1) ("Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals.").[9]

Another district court came to the opposite conclusion. In *Parker v. Norris*, 929 F. Supp. 1190 (E.D. Ark. 1996), the court, after noting that the Act's legislative history "shines absolutely no light on this patently apparent conflict," and agreeing with the *Houchin* court that "'it is

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[9]Other district courts have followed *Houchin* without additional analysis of the issue. *See Taylor v. Mitchell*, 939 F. Supp. 249, 58 (S.D.N.Y. 1996); *Geiger v. Morton*, 1996 WL 361474 at *7 n.9 (D.N.J. June 24, 1996); *Johnston v. Love*, 940 F. Supp. 738, 754 n.1 (E.D. Pa. 1996); *Griffin v. Endicott*, 937 F. Supp. 832, 834 (E.D. Wis. 1996).

unlikely contemplation played any role at all' in the drafting of these particular amendments," held that, because Rule 22 specifically refers to § 2253, the procedures of that statute control. *Id*, at 1192. The *Parker* court concluded that Congress simply failed fully to amend Rule 22 to conform to the amendments to § 2253(c). *Id*. at 1193.

We did not find this reasoning persuasive.[10] Rule 22(a) does state that "[t]he applicant may, pursuant to section 2253 of title 28, United States Code, appeal to the appropriate court of appeals from the order of the district court denying the writ," and Rule 22(b) states that an appeal requires that "a district or circuit judge issue [] a certificate of appealability pursuant to section 2253 (c)." However, the remainder of Rule 22(b) clearly contemplates that district courts will issue certificates of appealability, requiring that "the district judge who rendered the judgment shall either issue a certificate of appealability of state the reasons why such a certificate should not issue." Fed. R. App. P. 22(b). The Rule also provides that if a "district judge has denied the certificate, the applicant for the writ may then request issuance of the certificate by a circuit judge." *Id*. Thus, although this incorporation argument offers a plausible-sounding rationale for favoring the statute over the Rule, it really does no more than restate the issue as a conflict within Rule 22, and not just between the rule and the statute or between two parts of the statute. The basic question remains: does the retention in Rule 22(b) of a detailed framework including district court issuance of certificates of appealability indicate Congress's true intent, or does the "circuit justice or judge" language of § 2253(c)(1) indicate that Congress intended to preclude district judges from exercising this power?

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[10]We note, too, that we can find no other opinions which follow *Parker*.

2. Textual Analysis

We next look to our traditional tools of statutory construction to solve this puzzle. *See NLRB v. United Food and Commercial Workers Union*, 484 U.S. 112, 123 (1987) ("On a pure question of statutory construction, our first job is to try to determine congressional intent, using 'traditional tools of statutory construction.' If we can do so, then that interpretation must be given effect. . . . "); *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 202 (1819) ("Where words conflict with each other, where the different clauses of an instrument bear upon each other, and would be inconsistent unless the natural and common import of words be varied, construction becomes necessary. . . ."). The most relevant of these tools are also the most basic: if possible, we must read the statute as a coherent whole and give effect to every word of the AEDPA. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979); NORMAN J. SINGER, 2A SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 46.06 (5th ed. 1992) [hereinafter SUTHERLAND STAT. CONSTR.]. If that is not possible, "the construction that produces the greatest harmony and the least inconsistency is that which ought to prevail." *Id.* § 46.05 at p. 104 (citation omitted).

These considerations lead us to believe that district courts retain the authority to issue certificates of appealability under the AEDPA. Section 2253(c)(1) can, albeit with considerable effort, be read to invest district judges with the authority to issue the certificates: if "circuit" in "circuit justice or judge" is read as the antecedent only of "justice" and not of "judge" then the phrase means "circuit justice or any judge." This is, indeed, a tortured interpretation, but a possible one. Rule 22, in contrast, can only be read as authorizing both district and circuit judges to issue certificates. The Rule refers to the "district judge who

rendered the judgment," and provides a procedure for obtaining a certificate from a circuit judge "[*i*]*f* the district judge has denied the certificate." Rule 22(b) (emphasis added). If § 2253(c)(1) controls, then all of this explicit language in the present Rule 22(b) is superfluous and misleading, and must be ignored. If the Rule controls, then we need only modify the punctuation of § 2253(c)(1), or perhaps add an article.[11] *See Lake Cumberland Trust, Inc., v. U.S. EPA*, 954 F.2d 1218, 1222 (6th Cir. 1992) ("[W]e must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous.") (quoting *Boise Cascade Corp. v. U.S. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991)); 2A SUTHERLAND STAT. CONSTR. §46.06 ("A statute should be construed so that effect is given to all its

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[11]If § 2253(c) were to read "a circuit justice or *a* judge," it would not conflict with Rule 22(b). Similarly, adding a pair of commas, so that the provision read "a circuit justice, or judge," would ameliorate the conflict. The note to the Seventh Circuit's new Local Rule 22.1 similarly argues that § 2253(c)(1) can be parsed to render it consistent with Rule 22(b). *See* 7th Cir. R. 22.1 1996 Note (provision in Rule 22(b) allowing district courts to issue certificates of appealability "implies that 'circuit justice or judge' in § 2253(c)(1) should be read as '(circuit justice) or judge' rather than "circuit (justice or judge)'". We do not, of course, purport to rewrite the statute; rather this shows that Congress could more easily have overlooked minor errors in § 2253(c) than have ignored the entire text of Rule 22(b). *Cf.* 2A SUTHERLAND STAT. CONSTR. § 47.15 ("Although it has been frequently asserted that 'Punctuation is a most fallible standard by which to interpret a writing,' it is more satisfactory to treat the rules of punctuation equally with other rules of interpretation.") (citation omitted); *id.* § 47.38 ("In construing a statute, it is always safer not to add to or subtract from the language of a statute unless imperatively required to make it a rational statute.").

provisions, so that no part will be inoperative or superfluous . . . and so that one section will not destroy another unless the provision is the result of obvious mistake or error"); *id.* § 46.07 ("[W]ords or clauses may be enlarged or restricted to harmonize with other provisions of an act.").

We also find some slight support for this position in the oft-quoted canon that specific provisions take precedence over more general ones. *See id.* § 46.05 at 105. Although § 2253(c)(1) and Rule 22(b) are equally specific in that they both explicitly govern the issuance of certificates of appealability, the Rule provides more specific procedures than does § 2253(c)(1). To the extent that this canon rests on the notion that greater detail and specificity indicate greater legislative attention to a particular provision, it would suggest favoring Rule 22(b) over § 2253(c)(1).

In the end, we find that these canons of statutory construction point toward giving effect to the lengthy and detailed provisions of Rule 22(b), rather than to the easily overlooked language of § 2253(c)(1).

3. Legislative History

Because this textual solution is not unassailable, we next examine the Act's background and legislative history. Certificates of probable cause have been a prerequisite to appellate review of denials of habeas petitions since 1908. *Barefoot v. Estelle*, 463 U.S. 880, 892 n.3 (1983). Before this year, both district and circuit judges could, and did, issue the certificates. *See* 28 U.S.C. §2253 (1995); *Barefoot*, 463 U.S. at 893. Since at least as far back as 1982, however, there have been efforts in Congress to strip district courts of this authority and require petitioners to apply to the courts of appeals for the certificates. *See* proposed Habeas Corpus Reform Act of 1982, S. 2216, 97th

Cong., 128 CONG. REC. S4336-38, §§ 3, 4 (1982) (proposing amendment of § 2253 and Rule 22(b) to allow only appellate judges to issue certificates of probable cause). Throughout the 1980s and the first years of this decade numerous proposals would have amended habeas corpus procedure; most of these would have divested the district courts of the authority to issue the certificates. *Compare, e.g.*, proposed Habeas Corpus Reform Act of 1989, S. 811, 101st Cong., 135 CONG. REC. S811-01, §§ 3, 4 (1989) (Proposing to amend § 2253 and Rule 22(b) to remove district courts from process) *with* proposed Omnibus Crime Control Act of 1991, H.R. 7892, 102d Cong., 137 CONG. REC. H7892-02, § 1107 (proposing to amend § 2253 so that only non-capital appeals require certificates of probable cause, issuable by either a district or a circuit judge); proposed amendment No. 2043 to S. 55, 102d Cong., 138 CONG. REC. S8002-02, § 207 (1992) (same). It is impossible to say whether these bills died in Congress because of, despite, or regardless of the changes they did or did not make to this aspect of habeas procedure. This history therefore does little to help decide the issue. *See* 2A SUTHERLAND STAT. CONSTR. § 48.01 at p. 302 ("[I]t should be remembered the statements made by persons in favor of a rejected or failed bill are meaningless and cannot be used as an extrinsic aid.").

The 1996 Act's legislative history is similarly unhelpful; to the extent it relates to the question of who may issue the certificate it serves to muddy rather than clarify. The record in Congress reveals that the conflict between § 2253(c) and Rule 22(b) is not the product of a last-minute compromise, but existed for more than a year before the bill's passage: the proposed amendments to § 2253 and Rule 22 have been in conflict since the spring of 1995. *See* S. 623, 104th Cong., §§ 3, 4 (1995) (amending § 2253 and Rule 22 inconsistently). *But see* Yackle, *New Habeas*

Corpus, 44 Buff. L. Rev. at 390 n.33 (failure to amend Rule 22 to conform with § 2253 is "almost certainly an oversight"). That the House version of the bill did not contain this inconsistency only adds to the confusion. *See* H.R. 729, 104th Cong., §§ 102, 103 (1995) (which would have amended both § 2253 and Rule 22 to allow only appellate judges to issue certificates).

At oral argument, the state emphasized that the Act's amendment to § 2253 specifically deleted that sections reference to district courts' authority to issue certificate of appealability. The amendment to § 2253 deleted the language "the justice or judge who rendered the order or," and retained the language "a circuit justice or judge." *Compare* § 2253 (1995) *with* § 2253(c)(1) (1996). This, the state claimed, demonstrates a clear intent to remove district judges from the process. This argument would be persuasive if we were attempting to determine only the meaning of § 2253, but nobody claims that § 2253 is itself unclear. Rather, the statute as a whole is ambiguous because of the conflict between § 2253(c) and Rule 22(b); additional evidence that § 2253 means what it clearly says is superfluous.

The other relevant part of the Act's legislative history is even more puzzling. On April 4, 1996--almost two weeks before the final votes on the bill in the House and Senate[12]--

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[12]The Senate passed the final bill on April 17, the House on April 18. *See* 1996 U.S.C.A.A.N. 924. Both houses subsequently passed resolutions correcting errors in the Act after this. *See* S. Con. Res. 55, 104th Cong. (1996) (correcting technical errors in the AEDPA); 142 CONG. REC. H3744-01 (April 24, 1996) (same). President Clinton signed the bill, including the technical amendments, on April 24, 1996. 110 Stat. 1214.

the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States sent a letter to Representative John Conyers, the ranking minority member of the House Judiciary Committee, pointing out the conflict between Rule 22(b) and § 2253(c). The letter noted that "the courts will have a nearly impossible task" of resolving the conflict, and suggested two alternate amendments which would resolve the conflict one way or the other, respectively. The committee apparently ignored the letter; in any case, no change was made, and there is no record of any response. In the end, then, none of the Act's legislative history gives any indication as to how Congress would decide this issue.

4. Statutory Purpose and Policy

We next look to see whether the statute's purpose can help us decide the text's meaning. Congress enacted the AEDPA to streamline habeas corpus process, particularly in capital cases, without violating prisoners' due process rights. *See supra* note 6. Congress would thus appear to favor a reading of the statute which would expedite the appeals process.

On the one hand, allowing district judges to issue certificates of appealability may have inefficient aspects. If a district judge refuses to issue a certificate, the petitioner may seek a certificate from a circuit judge, adding another time-consuming step to the process. *See* FED. R. APP. P. 22(b); Ira P. Robbins, *The Habeas Corpus Certificate of Probable Cause*, 44 Ohio St. L. J. 307, 330 n.153 (divesting district courts of power to issue certificates of probable cause would "alleviate the problems argued by some that review by the district judge and then the circuit judge has developed into two time-consuming quasi-appeals" before the merits are considered on appeal).

On the other hand, however, it seems clear that a district judge who has just denied a habeas petition will be able to evaluate that petitioner's request for a certificate of appealability more quickly than would a circuit judge fresh to the case. The district judge will have an intimate knowledge of both the record and the relevant law and could simply determine whether to issue the certificate of appealability when she denies the initial petition. *See Taylor v. Mitchell*, 939 F. Supp. 249, 258 (S.D.N.Y. 1996) (denying writ and certificate of probable cause in single order); *Nichols v. Kelly*, 923 F. Supp. 420, 427 (W.D.N.Y. 1996) (denying writ and certificate or probable cause in single order); *Huffman v. Moore*, 333 F. Supp. 1315, 1317 (E.D. Tenn. 1971) (including certificate of probable cause as part of opinion denying writ). *But see* note 4, *supra* (citing cases in which district judges ruled on the motion for a certificate of probable cause after the notice of appeal had been filed). Circuit judges, in contrast, would have to obtain and then spend time familiarizing themselves with the often-chaotic records and pro-se briefs before they could evaluate requests for certificates. *See* Robbins, *The Habeas Corpus Certificate of Probable Cause*, 44 Ohio St. L.J. at 330 (1983) (arguing that "the certificate was designed to free the appellate courts from reviewing frivolous habeas petitions, but the [proposed change] places them at the center of the decision regarding frivolousness and requires them to delve into the merits of the claims"). If the certificate were issued by a circuit judge, there is no guarantee that the same circuit judge would even sit on the panel assigned to hear the merits of the case. In this respect, then, allowing district judges to issue certificates of appealability would better serve the Act's purposes.

It is not clear to us whether restricting issuance of certificates of appealability to circuit judges or permitting district judges to issue certificates would necessarily lead to

speedier resolution of habeas appeals. Courts are not well-suited to answering such empirical questions. However, we believe that efficiency considerations point toward permitting district judges to issue certificates of appealability, consistent with the detailed framework of Rule 22(b). *See* Robbins, *The Habeas Corpus Certificate of Probable Cause*, 44 Ohio St. L. J. at 332-333 (arguing that in order "both to fulfill further the congressional intent [to eliminate habeas petitions 'that are frivolous and cause unnecessary delay'] and to conform to the purpose of habeas corpus relief. . . . [d]istrict judges should retain the power to issue certificates.").

Lyons suggests that the principle of lenity, that ambiguous criminal statutes should be construed narrowly, is relevant to this discussion. *See generally United States v. R.L.C.*, 503 U.S. 291, 305-13 (1992) (discussing rule of lenity). We do not believe this principle applies per se, because neither Rule 22(b) nor § 2253 is a criminal statute. *Cf. id.* at 305 ("rule has been applied not only to resolve issues about the substantive scope of criminal statutes, but to answer questions about the severity of sentencing"). We do, however, share the underlying "instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." *Id.* (quoting *United States v. Bass*, 404 U.S. 336, 348 (1971), and HENRY J. FRIENDLY, BENCHMARKS 209 (1967)). Because Congress may have intended that prisoners still have the choice of asking the district court to issue a certificate of appealability, a court should hesitate take that right away from them. This lends some support to our conclusion that the AEDPA allows district courts to issue certificate of appealability.

Because neither the legislative history nor any overwhelming policy considerations support a contrary reading, we hold that district judges may issue certificates of appealability under the AEDPA. We emphasize that this is

what we believe Congress intended, and that we, too, welcome the clarification of this statutory conflict sought initially by the Judicial Conference prior to the Act's passage.

5. General Showing Required for Certificates of Appealability under the AEDPA

Before we can decide whether the new certificate of appealability provisions apply to Lyons's appeal we must also determine whether these new certificates of appealability require a different general showing than did the former certificates of probable cause. When Lyons filed his application for a certificate of probable cause he assumed that he had to make a "substantial showing of the denial of [a] federal right" before a certificate would issue. *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983) (alteration in original). To require that his pre-Act request meet a higher burden under the new act would raise obvious retroactivity concerns under *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994). It seems clear, however, that, *at least so far as this case is concerned*, the AEDPA merely codifies the *Barefoot* standard. The new law states that certificates may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Because there is no indication that Congress intended to change the standard, its use of the language from *Barefoot* indicates an endorsement of that case's approach. *See* 2A SUTHERLAND STAT. CONSTR. § 45.15 ("[T]he legislature's use of statutory language similar to that used in a prior judicial decision should constitute legislative approval of that decision."). The AEDPA thus makes no change to the general showing required to obtain a certificate, and, aside from the new specificity requirement discussed below, essentially makes only a change in nomenclature from a "certificate of probable cause" to a "certificate of

appealability."[13] *Accord Herrera V. United States*, 96 F.3d 1010, 1012 (7th Cir. 1996); *Reyes v. Keane*, 90 F.3d 676, 680 (2d Cir. 1996); *Lennox*, 87 F.3d at 434-35. *But see Williams v. Calderon*, 83 F.3d 281, 286 (9th Cir. 1996) (referring in dicta, without any discussion, to "the Act's more demanding standard" for the issuance of a certificate of appealability).

6. Retroactivity under *Landgraf* of Specificity Requirement for Certificates of Appealability

The AEDPA, then, affects neither the authority of district courts to issue certificates of appealability nor the general showing necessary to obtain such a certificate. The new Act does, however, require that certificates of appealability, unlike the former certificates of probable cause, specify which issues are appealable, 28 U.S.C. § 2253(c)(3), i.e. which claims present a "substantial showing of the denial of a constitution right." § 2253(c)(2). The final question we must address is whether applying this new specificity provision to Lyons's appeal would have

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[13]Because Lyons does not raise any non-constitutional federal claims, we need not address the statute's substitution of "constitutional right" for *Barefoot's* "federal right," except to note that it may introduce another conflict into the statute. *See* 28 U.S.C. §§2254, 2255 (allowing collateral attack by state and federal prisoners, respectively, imprisoned "in violation of the Constitution or laws" of the United States) (unchanged by AEDPA). *But see Lennox v. Evans*, 87 F.3d 431, 434 (10th Cir. 1996) (AEDPA did not change law because the "decision on a motion for a certificate for probable cause must cohere to the principle that a federal habeas court does not review a state conviction for legal error in a broad sense, but only for federal constitutional error"), *cert. denied*, __S. Ct. __, 1996 WL 665079 (1997).

retroactive effect under *Landgraf* and would thus be improper.

In most, but not all, cases, new laws which affect only procedure or jurisdiction will not have an impermissible retroactive effect. *Landgraf*, 511 U.S. at 274-75. *See Qasguargis v. INS*, 91 F.3d 788, 789 (6th Cir. 1996) (order). For the reasons set forth below, we hold that the new requirement that a certificate of appealability indicate which specific issues make the "substantial showing" of §2253(c)(2) falls well within the general rule and is not impermissibly retroactive.

As an initial matter, it is plain that retrospective application of this provision does not violate the Ex Post Facto Clause. The requirement that the certificate of appealability include a specification of appealable issues "does not punish as a crime an act previously committed, which was innocent when done; nor make more burdensome the punishment for a crime, after its commission; nor deprive one charged with crime of any defense available according to law at the time when the act was committed." *Collins v. Youngblood*, 497 U.S. 37, 52 (1990).

Retroactivity analysis is not a science. *See Landgraf*, 511 U.S. at 270 ("Any test of retroactivity will leave room for disagreement in hard cases, and is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity."). Although courts often state that the appropriate test is whether application of a new law "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed," *id.* at 280, there is more to *Landgraf* than just this. "[A] statute 'is not made retroactive merely because it draws upon antecedent facts for its operation.'" *Id.* at 270 n.24 (quoting *Cox v. Hart*, 260 U.S.

427, 435 (1922)). In deciding whether such a statute has retroactive effect we must also consider, at a minimum, "the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." *Id.* at 270.

We first address whether applying the Act would "impair rights a party possessed when he acted." Before this year, a prisoner who could convince a judge that one of the claims in his rejected habeas petition was substantial was thereby entitled to appellate review of all the claims in that petition. If the Act applies, however, a court of appeals will address only the issues which are specified in the certificate of appealability. The Act could, then, be seen as impairing Lyons's right to have all his claims reviewed on appeal. However, "[n]o one has a vested right in any given mode of procedure." *Crane v. Hahlo*, 258 U.S. 142, 147 (1922). *See Landgraf*, 511 U.S. at 275 (noting "the diminished reliance interests in matters of procedure"). If the district court were to certify only certain issues for appeal, Lyons could seek a broader certificate of appealability from a circuit judge.[14] Lyons thus retains the right to request appellate consideration of his entire petition, and the change to the law does not impair his rights.[15]

Similarly, applying the new law does not increase Lyons's liability for past conduct, because the law does not

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[14]Rule 22(b) provides that the applicant may seek a certificate of appealability from a circuit judge if the district judge has denied the certificate. We believe that allowing a similar request to a circuit judge where the certificate is denied in part is consistent with this provision.

[15]We need not decide whether applying these new provisions would be proper if Lyons's right to appeal were curtailed.

increase the punishment which attaches to Lyons's offenses. *Collins v. Youngblood*, 497 U.S. 37, 52 (1990). Nor does the AEDPA impose new duties with respect to his past conduct. The documents accompanying Lyons's application for a certificate of probable cause included a clear statement of which issues he intended to appeal and argued that "the[se] issues are debatable among jurists of reason [and] a court would resolve [them] in a different manner." The application was proper both before and after the AEDPA went into effect. It could, of course, be argued that Lyons might have better developed each issue or certain issues had he thought that the AEPDA would be applied. However, as noted above, *Landgraf* requires that we take into account the extent of the change in the law, which is, in this case, minor.

Our conclusion that the specificity requirement of the Act should be applied to this case also finds support in our prior decisions. In *Forest v. United States Postal Service*, 97 F.3d 137 (6th Cir. 1996), Judge Jones held in an opinion for the court that the 1991 Civil Rights Act's extension of a statute of limitations should apply to a case where the defendant's discriminatory conduct predated the new law, in part because "the 1991 Act applied to [plaintiff's] conduct, the filing of the complaint, which occurred after the enactment of the statute." *Id.* at 140. Similarly, in the case now before us the new Act applies more to the district court's conduct than to Lyons's: § 2253(c)(3) requires only that the court issue a more detailed certificate than was required before. Just as new jurisdictional laws will regularly be applied to pending cases because "jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties,'" *Landgraf*, 511 U.S. at 274, (quoting *Republic Nat. Bank of Miami V. United States*, 506 U.S. 80, 100 (1992) (Thomas, J., concurring)), so does § 2253(c)(3) address the court's responsibility. The district court thus should have followed the law in effect at the time

it issued Lyons's certificate or probable cause.

We hold, then, that the provision of § 2253(c)(1) requiring that certificates of appealability specify which issues are appealable should apply to the case before us. We are aware that this ruling puts us squarely in conflict with the Seventh Circuit's holding in *Martin v. United States*, 96 F.3d 853, 855 (7th Cir. 1996). In *Martin*, Chief Judge Posner held under quite similar circumstances that the new "certificate of appealability is not required for an appeal perfected before the effective date of the new statute." We agree with *Martin* that, under Federal Rule of Appellate Procedure 4(c), an inmate's appeal is "deemed filed when the prisoner hands the notice of appeal to the prison officials for filing."[16] *Martin*, 96 F.3d at 855. We do not, however, agree that requiring district judges to apply this portion of the AEDPA to petitions filed before April 24 "would attach a new legal consequence to a completed act." *Id.* The *Martin* decision does not explain the reasoning behind this conclusion, but instead directs us to *Landgraf*, 511 U.S. at 275 n.29, and to Judge Posner's opinion in *Reyes-Hernandez v. INS*, 89 F.3d 490, 492 (7th Cir. 1996). The citation to *Landgraf* refers, we assume, to the Court's statement that "[a] new rule concerning the filing of complaints would not govern an action in which the complaint had already been properly filed under the old regime . . . ." *Landgraf*, 511 U.S. at 275 n.29. The rule at issue in *Martin* and the case at bar does not, of course, concern the filing of anything; it

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[16]Under FED. R. APP. P. 4(c), a confined inmate's notice of appeal "is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing." The remainder of the provision indicates that this procedure constitutes filing the notice of appeal. *Id.* ("In a civil case in which the first notice of appeal is filed in the manner provided in this subdivision (c). . . .").

directs the district court to issue certificates of appealability which are more specific than the old certificates of probable cause. Moreover, although Lyons (and Martin) had perfected their appeals by filing a notice of appeal and request for a certificate before the AEDPA's enactment, the district court had not yet issued certificates by the enactment date. Thus *Landgraf's* footnote 29 regarding the retroactivity of applying a filing rule to an already-filed complaint does not apply here or in *Martin*; rather it would be applicable if the district court had issued a certificate of probable cause before the enactment date. The *Landgraf* footnote does not, then, really explain *Martin's* conclusion that a court should not follow the current law when it issues a certificate of appealability. Nor is *Reyes-Hernandez* an apposite precedent.[17]

We note, too, that the approach taken in *Martin* seems incompatible with the Seventh Circuit's later en banc opinion in *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996) (en banc), *cert. granted*, ____S. Ct.____, 1997 WL 8539 (1997). The *Landgraf* analysis in *Lindh* seems to take as its touchstone a party's reliance on the old statute in conducting his affairs. *See id.* at 867 ("Lindh's litigating decisions were not affected

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[17]*Reyes-Hernandez* addressed a different issue: Reyes-Hernandez had conceded deportability before the enactment of the AEDPA, an action he might well not have taken if he had known that a new statute would deny him judicial review of the decision of the Board of Immigration Appeals. 89 F.3d at 491. The case seems to rest on reliance. *See id.* at 492 ("[J]urisdictional and procedural provisions normally are applied to pending cases . . . [because] [p]eople normally don't rely on such provisions in planning and conducting the affairs of life, and so the reliance interest which is the foundation of the interpretive principle limiting retroactive application is not engaged."). There is no such reliance interest in the case before us.

by the difference between the versions of § 2254. . . . The new law therefore governs our consideration of Lindh's contentions."). *See also id.* at 863 ("We take it that under *Landgraf* a certificate of probable cause to appeal *issued* before April 24, 1996, authorizes an appeal, although after April 24 appeal depends on a 'certificate of appealability' under § 102 of the 1996 Act . . . .") (emphasis added). *Lindh* was decided eight days after *Martin* but does not mention the earlier case.

Our conclusion that the specificity requirement for certificates of appealability should apply to this case accords with the view of the Second Circuit. In *Reyes v. Keane*, 90 F.3d 676 (2d Cir. 1996), the petitioner had applied for a certificate of probable cause in 1995, long before the AEDPA took effect. *Reyes*, 90 F.3d at 679. Nonetheless, the Second Circuit could "see no reason why the new [certificate of appealability] provision, with its procedural requirement of specifying issues warranting an appeal, should not apply" to the case, and viewed the change as "well within the category of procedural changes that pose no issue of retroactivity under *Landgraf*." *Id.* at 680. For the reasons discussed above, we agree with the *Reyes* court's conclusion as to this issue.

IV. CONCLUSION

We hold that under the AEDPA, district courts have the authority to issue certificates of appealability and that these certificates must state which issues are certified for appeal. Because the certificate issued by the district court does not comply with this requirement, we believe it would

be improper for us to examine the merits of Lyons's petition.[18] Accordingly, we remand the case to allow the district court to issue a proper certificate of appealability consistent with this opinion. If the district court believes that more information from the parties would be helpful, it can of course request if from them.

Accordingly we REMAND this case to allow the district court to issue a certificate that complies with the Act.

RYAN, Circuit Judge, concurring. With something less than absolute certainty, I concur in my colleagues' conclusion that the district court in this case has the authority to issue a certificate of appealability permitting the petitioner to appeal the denial of his request for a writ of *habeas corpus*. I do not reach that conclusion, however, for all of the reasons enunciated in my sister's opinion; as a matter of fact, I disagree very strongly with some of them. The challenge, of course, is to determine the intent of Congress and the President in enacting and approving, respectively, the amendments to 28 U.S.C. § 2253 and Fed. R. App. P. 22(b).

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[18]If the district court had denied the certificate, Rule 22 would permit this court to issue one. The Rule does not, however, give us the authority to correct a faulty certificate sua sponte. FED. R. APP. P. 22(b) ("If the district judge has denied the certificate, the applicant for the writ may then request issuance of the certificate by a circuit judge. . . . If no express request for a certificate is filed, the notice of appeal shall be deemed to constitute a request addressed to the judges of the court of appeals.").

I.

A.

Under ordinary circumstances the plain language of a statute should control the statute's interpretation. In this case, however, the relevant provisions of the Antiterrorism and Effective Death Penalty Act do not yield a plain interpretation. Whereas section 102 of the Act, amending 28 U.S.C. § 2253, provides that "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal [of denial of a writ of *habeas corpus*] may not be taken to the court of appeals," section 103 of the Act, amending Rule 22(b), provides that such an appeal may not be taken "unless a district or a circuit judge issues a certificate of appealability."

I recognize that it is possible to read sections 102 and 103 of the Act in harmony by supposing that, in section 2253(c)(1), Congress intended the word "circuit" to modify only "justice" and not "judge." To my mind, however, this contortion is too extreme to be considered meaningful and I am unwilling to rely upon it merely to avoid the fairly unremarkable conclusion that the Act points in two directions at once. My resistance to this approach is fortified by the fact that, prior to the Act, section 2253 provided that "[a]n appeal may not be taken to the court of appeals . . . unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause." Unless this passage was unnaturally redundant, the pre-Act phrase "circuit justice or judge" did not include the judges of the district court.

I also reject the argument that Rule 22(b) does not conflict with section 2253 because it provides that the certificate of appealability should be issued "pursuant to section 2253(c)." To suppose that this clause renders a

district court's issuance of a certificate unauthorized or, at the least, ineffectual, is to make nonsense of the great bulk of Rule 22(b)'s plain language.

To my mind, then, it is clear that, as amended, section 2253 excludes the district courts from the certification process while, at the same time, Rule 22(b) expressly includes them. In such circumstances, our usual course is to consider the statute's legislative history. Unfortunately, the legislative history pertaining to these amendments is not enlightening. Both parties before this court, and the courts that have previously considered the problem, have concluded that the legislative history does not speak specifically to the role of the district courts in the issuance of certificates of appealability. I have found no legislative history to upset this conclusion.

Unable to locate a precise statement of intent, both Lyons and the state have endeavored to find support for their positions in the undisputed but general congressional intent to make the *habeas* process more efficient. Indeed, both parties have suggested colorable reasons why efficiency concerns might favor their respective positions. However, whether district courts, appellate courts, or both courts acting in concert would be more or less efficient in the consideration of certificates of appealability is a legislative question. It is not within a court's competence to suppose Congress's intent by speculating as to the balance of these efficiencies.

Recognizing that the weighing of efficiencies is a peculiarly legislative function does not, of course, resolve the statutory conundrum before us. Rather, it leads me to the conclusion that the intended application of Rule 22(b) and section 2253 must be gleaned solely from an analysis of the present and past language of these provisions. To this end,

it seems most likely that Congress either: (1) intended to delete the district court's authority in section 2253(c) but neglected to amend Rule 22(b) accordingly; or (2) intended to retain the district court's authority in Rule 22(b) but inadvertently deleted it in section 2253(c). The possibility that Congress intended to require both the district court and the circuit court to issue a certificate of appealability is one I reject because if offends the apparent meaning of *both* section 2253 and Rule 22(b).

I conclude that district courts are authorized to issue certificate of appealability and that, where the district court does issue such a certificate, "a circuit justice or judge" is not also required to do so. It seems to me more likely that Congress accidentally excluded the district courts from section 2253 than it does that Congress intended this exclusion but failed to notice or remedy the substantial contradictory language of Rule 22(b). Had Congress made no changes whatsoever to Rule 22(b), the contrary result might be more reasonably inferred. In light of section 103 of the Act, however, there can be no doubt that Congress was cognizant of Rule 22(b).

Ultimately, the interpretation of the Act which includes the district court's involvement appears to me to be a less flagrant affront to the statutory language of section 2253(c) than a contrary conclusion would be to the language of Rule 22(b). This is, there can be no doubt, a sorry foundation for the construction of a statute. We do not, however, have the luxury of nondecision and, as I have argued, the alternative bases for interpreting the Act are either less sound or, worse yet, altogether improper.

I do not reach my conclusion in this case easily. If fact, my instincts argue against my conclusion. Congress has considered transferring the certification process from the

district court to the circuit court many times in the last fourteen years. It is plausible that the new amendments were intended to effect this change and, in my judgment, it could well be more efficient to do so. But, as I have said, it would be inappropriate to impute to the enactors of the legislation my notions of judicial economy. Moreover, the many attempts over the years to remove the district courts from the certification process may, in the final analysis, just as easily portend another failure as they may a final success.

In my opinion, the amendments to section 2253 and Rule 22(b) are more reasonably read as retaining the district court's authority to certify *habeas* appeals to this court. Accordingly, I concur in my colleagues' judgment.

B.

I also agree that the law of *Landgraf v. USI Film Products*, 511 US. 244 (1994), means that the amended certificate of appealability provisions of the Antiterrorism and Effective Death Penalty Act of 1966 (sic) discussed above apply to this case. I agree that the case must be remanded to allow the district court to issue a certificate that complies with 28 U.S.C. § 2253(c)(3).

Dated: May 1, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Larry Lyons,	:	
Petitioner,	:	
v.	:	Case No. C2-95-542
Ohio Adult Parole Authority, et al.,	:	JUDGE SMITH
Respondents.	:	

ORDER

The petitioner having filed a notice of appeal from the judgment of this Court denying the petition for a writ of habeas corpus, this matter is now before the Court for a determination of whether or not a certificate of probable cause should issue.

Upon consideration and being fully advised, the Court certified that there exists probable cause for appeal.

George C. Smith
United States District Judge

UNITED STATES DISTRICT COURT
Southern District of Ohio
Eastern Division

LARRY LYONS,

Plaintiff,

OHIO ADULT PAROLE AUTHORITY, et al.

Defendants.

JUDGMENT IN A CIVIL CASE

Case No. C2-95-542
Judge Smith
Magistrate Judge Kemp

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Opinion and Order filed March 25, 1996, the instant petition is DENIED and this action is hereby DISMISSED.

Date: March 25, 1996

KENNETH J. MURPHY, CLERK

By /Deputy Clerk

Filed March 25, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

LARRY LYONS,

Petitioner,

v.

Case No. C-2-95-542
JUDGE SMITH
Magistrate Judge Kemp

OHIO ADULT PAROLE AUTHORITY, et al.,

Respondent.

OPINION AND ORDER

Petitioner, a state prisoner, brings this action for a writ of habeas corpus pursuant to 28 U.S.C. §2254. This matter is before the Court on the instant petition, Respondent's return of writ, Petitioner's reply, and the exhibits of the parties.

Petitioner and two co-defendants were indicted by the Hamilton County Grand Jury for aggravated robbery on October 18, 1984. Represented by counsel, Petitioner proceeded to jury trial on November 19, 1984, and was found guilty as charged on November 26, 1984. On the same day, Petitioner was sentenced to prison for ten (10) to twenty-five (25) years.

Petitioner perfected a joint appeal with both of his co-defendants to the Court of Appeals for the First Appellate

District. The following assignments of error were raised on Petitioner's behalf:

1. THE FINDING OF GUILTY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

2. THE FINDING OF GUILTY WAS BASED ON INSUFFICIENT EVIDENCE.

On or about August 21, 1985, Petitioner attempted to file a supplemental *pro se* brief to raise the additional errors of the trial court's failure to grant Petitioner's motion for severance, ineffective assistance of trial counsel, and prosecutorial misconduct. On October 16, 1985, the Court of Appeals affirmed the judgment of the trial court.

On December 14, 1990, Petitioner sought leave to pursue a *pro se* delayed appeal in the Ohio Supreme Court. Petitioner argued that his conviction was against the manifest weight of the evidence, that his conviction was based on insufficient evidence, and that he received ineffective assistance of appellate counsel for counsel's failure to raise certain issues on direct appeal. On January 23, 1991, the Ohio Supreme Court denied Petitioner's request for leave to appeal. Petitioner does not challenge this conviction or sentence.

Effective May 2, 1994, Petitioner was released on parole. On June 30, 1994, Petitioner was declared a parole violator at large. Petitioner was notified in writing on August 3, 1994 that an on-site hearing to determine probable cause would be held on August 15, 1994. Petitioner was also notified that he had been accused of the following parole violations:

1. On or about June 26, 1994, Petitioner attempted to take nine cartons of cigarettes from the Save-A-Lot grocery store;

2. On June 30, 1994, Petitioner failed to appear in Clermont County Court of Common Pleas to answer to the attempted theft charges, causing a bench warrant to be issued for him;

3. On or about August 2, 1994, Petitioner took merchandise from Bigg's Food store;

4. On or about August 4, 1994, Petitioner gave false and misleading information to the police when questioned about his identity;

5. On or about June 27, 1994, Petitioner changed his address without notifying or obtaining permission from his parole officer; and

6. On or about June 27, 1994, Petitioner was unsuccessfully terminated from the Volunteers of America halfway house program.

On August 9, 1994, Petitioner executed in writing a waiver of his right to an on-site hearing.

Parole records reflect that Petitioner became available to the Ohio Adult Parole Authority ("APA") on October 6, 1994. A final revocation hearing that was originally scheduled for December 1, 1994 was rescheduled for January 5, 1995 as a formal hearing. Represented by the Ohio Public Defender's Office, Petitioner presented his case to a panel on January 5, 1995. On February 3, 1995, Petitioner was notified in writing that his parole had been revoked, and his

case continued to August, 1999.

On December 2, 1994, before his final revocation hearing had been held, Petitioner initiated an action in the Ohio Supreme Court for a writ of mandamus, or in the alternative, a writ of habeas corpus. Petitioner alleged the following claims for relief:

1. Petitioner was not afforded a timely final parole revocation hearing, or timely notice of a final revocation hearing.

2. Petitioner was prejudiced by the unreasonable delay.

3. Petitioner enjoyed a protected liberty interest in having his final revocation hearing within sixty (60) days because the same was promised to Petitioner in the notification forms that he received from the Ohio Adult Parole Authority.

On January 18, 1995, the Ohio Supreme Court dismissed Petitioner's action without opinion.

It appears that Petitioner thereafter sought leave to challenge in a delayed appeal the misdemeanor convictions that resulted in the revocation of his parole. The Court of Appeals for the First Appellate District denied Petitioner's request on March 17, 1995. Petitioner's motion for reconsideration was denied on April 21, 1995.

Petitioner filed the instant action on June 1, 1995. He raises the following claims for relief, reprinted here verbatim:

Ground One: CONVICTION OBTAINED BY PLEA OF GUILTY WHICH WAS UNLAWFULLY INDUCED OR NOT MADE VOLUNTARILY WITH UNDERSTANDING OF THE NATURE OF THE CHARGE

Supporting Facts: THE TRIAL COURT FAILED TO SUBSTANTIALLY COMPLY WITH CRIMINAL RULE GOVERNING VOLUNTARINESS OF GUILTY PLEAS AND PETITIONER DID NOT WAIVE HIS OBJECTION TO SUBJECT MATTER JURISDICTION BY ENTERING PLEA OF GUILTY. THE FIRST TOOK PLACE IN HAMILTON COUNTY MUNICIPAL COURT, THE LATTER IN CLERMONT COUNTY MUNICIPAL COURT, HOWEVER BOTH ARE RELATED TO PAROLE REVOCATION

Ground Two: DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL

Supporting Facts: TRIAL COUNSEL FAILED TO PRESENT EVIDENCE WHICH WAS MANIFESTLY EXCULPATORY IN NATURE, AND WHICH WAS MADE KNOWN TO COUNSEL BY PETITIONER REPEATEDLY PRIOR TO PLEA WHICH THERE IS NO RECORD EXCEPT A JOURNAL ENTRY, CLERMONT COUNTY MUNICIPAL COURT

Ground Three: THE OHIO ADULT PAROLE AUTHORITY LACK

JURISDICTION TO REVOCATE PETITIONER, SAME LACK SUBJECT MATTER JURISDICTION TO REVOKE PAROLE

Supporting Facts: PETITIONER WAS GIVEN NOTIFICATION STATING HE WOULD HAVE A FINAL REVOCATION WITHIN (60) DAYS UNLESS (emphasis added) HE WAS UNAVAILABLE PETITIONER WAS NOT AFFORDED A FINAL REVOCATION HEARING UNTIL HIS 155TH DAY OF CONFINEMENT (sic). WHEREFORE RESPONDENT WAIVED ITS AGREEMENT WITH PETITIONER AND REVOCATION SHOULD NOT HAVE BEEN UPHELD.

Ground Four: FAILURE TO PROPERLY AND/OR NOTIFY PETITIONER IN SUBJECT MATTER

Supporting Facts: PETITIONER WAS GIVEN NOTIFICATION THAT WAS PART OF AN AGREEMENT IN MATTERS GOVERNING FINAL REVOCATION AND (sic) RESPONDENT BROKE THAT AGREEMENT

On June 14, 1995, Petitioner filed a supplement to his §2254 action raising the additional arguments summarized below:

5. The Ohio Adult Parole authority lacked jurisdiction to hold a final revocation hearing and to revoke Petitioner's parole while his attack on the failure to hold the final hearing

within 60 days was pending in the Ohio Supreme Court.

6. The revocation of Petitioner's parole was discriminatory in that other similarly-situated parolees did not have their parole revoked.

Answering all of the above allegations, Respondent contends that Petitioner's first, second, and sixth claims are procedurally barred, and that the remaining claims are devoid of merit.

I.

In recognition of the equal obligation of the state courts to protect the constitutional rights of criminal defendants, and in order to prevent needless friction between the state and federal courts, a state criminal defendant with federal constitutional claims is required to present those claims to the highest court of the state for consideration. 28 U.S.C. §2254(b), (c). If he fails to do so, but still has an avenue open to him by which he may present the claims, his petition is subject to dismissal for failure to exhaust state court remedies. *Id*;, *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (per curiam); *Picard v. Connon*, 404 U.S. 270, 275-76 (1971). But if, because of a procedural default, the petitioner can no longer present his claims to a state court, he has also waived them for purposes of federal habeas review unless he can demonstrate cause for the procedural default and actual prejudice resulting from the alleged constitutional error. *Murray v. Carrier*, 477 U.S. 478, 485 (1986); *Engle V. Isaac*, 456 U.S. 107, 129 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977).

In the Sixth Circuit, a four-part analysis must be undertaken when the state argues that a federal habeas claim is precluded by the petitioner's failure to observe a state

procedural rule. *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986). "First, the court must determine that there is a state procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule." *Id.* Second, the Court must determine whether the state courts actually enforced the procedural sanction. *Id.* Third, it must be decided whether the state procedural forfeiture is an adequate and independent state ground upon which the state can rely to foreclose review of a federal constitutional claim. *Id.* Finally, if the Court has determined that a state procedural rule was not complied with and that the rule was an adequate and independent state ground, then the petitioner is required to demonstrate that there was cause for him not to follow the procedural rule and that he was actually prejudiced by the alleged constitution error. *Id.* This "cause and prejudice" analysis also applies to failures to raise or preserve issues for review at the appellate level. *Leroy v. Marshall*, 757 F.2d 94 (6th Cir.), *cert. denied*, 474 U.S. 831 (1985).

In his first claim for relief, Petitioner argues that his parole was revoked on the basis of subsequent convictions, which were in turn the product of involuntary and unknowing guilty pleas. Petitioner argues in his second claim for relief that he received ineffective assistance from his trial counsel for advising him to plead guilty to the subsequent offenses that led to the revocation of his parole. In his sixth claim for relief, Petitioner appears to be arguing that the revocation of his parole was discriminatory because other similarly-situated parolees were not treated similarly. Petitioner failed to raise any if (sic) these claims before the Supreme Court in his mandamus/habeas corpus action, and is precluded by the doctrine of *res judicata* from filing a successive action. *See Freeman v. Tate*, 65 Ohio St. 3d 440, 441 (1992). Thus, the first part of the *Maupin* test has been satisfied.

Because Petitioner has never presented these claims in the context of his parole revocation, the state courts were never given the opportunity to enforce the procedural default committed by Petitioner when he failed to include these claims in his state law mandamus/habeas action. Consequently, the Court deems the second part of the *Maupin* test to have been satisfied.

The Court further finds that the procedural rule applicable to Petitioner's claims is an adequate and independent state ground for denying relief. The doctrine of *res judicata* is stated in unmistakable terms in numerous Ohio decisions and Ohio courts have consistently refuse (sic) to review claims on the merits under that doctrine. *See State v. Cole*, 2 Ohio St. 3d 112 (1982); *State v. Ishmail*, 67 Ohio St. 16 (1981); *State v. Perry*, 10 Ohio St. 2d 175 (1967). Further, the doctrine of *res judicata* serves the state interest in finality and in ensuring that claims are adjudicated at the earliest possible opportunity.

Once the Court has determined that a procedural default is applicable to Petitioner's claims, and that this procedural default is an adequate and independent ground upon which to deny relief, it is incumbent upon Petitioner to demonstrate both cause for his failure to comply with the procedural rule, as well as actual prejudice from the alleged constitutional errors. As cause for his default, Petitioner appears to argue that at the time that he filed his mandamus/habeas action, his parole had not yet been revoked. Thus, reasons Petitioner, he could not have argued that the revocation was discriminatory, and based upon invalid guilty pleas procured by the ineffective assistance of counsel. Petitioner further argues that he attempted to present these issues to the Supreme Court in supplemental pleadings, but was not permitted to.

Petitioner's arguments are unavailing. Petitioner will not be heard to complain that these arguments were not available to him at the time that he filed his action in the Ohio Supreme Court when he deliberately chose to pursue his mandamus/habeas action before his final parole revocation hearing was held. Nor can the procedural default be excused by Petitioner's unsuccessful attempts to supplement his Ohio Supreme Court pleadings when it is clear from the exhibits submitted with Petitioner's traverse that each of his supplemental pleadings was rejected because of his failure to comply with the Ohio Supreme Court Rules of Practice. Having found that Petitioner failed to demonstrate cause for his procedural default, the Court finds that Petitioner's first, second, and sixth claims for relief are procedurally barred. The Court will turn now to a consideration of the merits of Petitioner's remaining claims.

II.

In his third, fourth, and fifth claims for relief, Petitioner argues that the APA lost jurisdiction over him when the board failed to hold his final parole revocation hearing within sixty days. Petitioner also challenges the adequacy of the notice that he received. Petitioner's claims are without merit.

With respect to the Adult Parole Authority's duty to hold a final parole revocation hearing, R.C. 2967.15 states in relevant part that

> If the authority fails to make a determination of the case of the parolee alleged to be a violator *within a reasonable time*, the parolee shall be released from custody under the same terms and conditions of his original pardon or parole. (emphasis

added)

See also Ohio Admin. Code §5121; 1-1-19 (B). The "reasonable time" standard was first articulated by the Supreme Court in *Morrissey v. Brewer*, 408 U.S. 471 (1972), and adopted by the Sixth Circuit in *Inmates's Councilmatic Voice v. Rogers*, 541 F.2d 633 (6th Cir. 1976), and the Ohio Supreme Court in *State ex rel. Jackson v. Denton*, 5 Ohio St. 3d 179 (1983). The Sixth Circuit and the Ohio Supreme Court have both rejected the notion that a final parole revocation hearing must be held within sixty days of the alleged violator's detention. *Councilmatic*, 541 F.2d at 636; *Ohio ex rel. Taylor v. Ohio Adult Parole Authority*. 66 Ohio St. 3d 121, 123-24 (1993); *State ex rel. Jackson*, 5 Ohio St. 3d at 180 (1983).

In his traverse, Petitioner cites to a decision issued by the United States District Court for the Northern District of Ohio in the *Inmates' Councilmatic Voice* case on January 21, 1992 which held that any inmate not receiving a final parole revocation hearing within sixth days of the placement of the APA's detainer was to be "release[d] ... from custody under the same terms and conditions of his or her original parole." That decision was reversed by the Sixth Circuit Court of Appeals on March 25, 1993 as having been issued without jurisdiction. *Inmates' Councilmatic Voice V. Wilkinson*, Nos. 92-3218 and 92-3275 (6th Cir. March 25, 1993), 1993 WL 87431. Thus, the issue is not whether Petitioner was afforded a final hearing within sixty days of his detention, or whether he was even entitled to a final hearing. Rather, the issue is whether the delay between Petitioner's detention and final revocation hearing was reasonable.

To determine whether delay in holding a final parole revocation hearing is unreasonable, the Court must consider (1) the length of the delay, (2) the reasons for the delay, (3)

the alleged violator's attempts to assert the right, and (4) prejudice to the alleged violator. *Hanahan v. Luther*, 693 F.2d 629 (7th Cir. 1982), *cert. denied* 459 U.S. 1170 (1983) (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). With respect to the prejudice factor, courts must consider whether the alleged violator suffered an oppressive pre-hearing incarceration, experienced excessive anxiety and concern as a result of the delay between his detention and final hearing, and was impaired in the ability to present his defense. *Hanahan*, 693 F.2d at 635.

Petitioner has not demonstrated, and it does not appear from the record, that there was any unreasonable delay prior to his final revocation hearing. Parole records indicate that Petitioner became available to the APA on October 6, 1994, presumably after he had finished serving the sentences imposed upon him in connection with the unauthorized use of property, theft, and obstruction of justice convictions. Petitioner's final hearing was originally scheduled for December 1, 1994, less than sixty days after he became available to the APA. His hearing was rescheduled for January 5, 1995 in accordance with Petitioner's desire to have a formal hearing. The Court concludes that this span of approximately three months is not presumptively unreasonable.

Nor does the Court find that Petitioner was prejudiced by any delay prior to his final hearing. Petitioner asserts that he was prejudiced in the sense that he desisted all preparation for the hearing when it was not held within sixty days. But the record reflects that Petitioner was represented by counsel, that he admitted all of the violations with which he was accused, and that he presented evidence in mitigation to which the panel "was attentive." (Ohio Dept. Rehab. Corr. letter, February 3, 1995, Respondent's Exhibit K). Thus, the Court is not persuaded that Petitioner suffered any

prejudice as a result of the three-month delay prior to his final revocation hearing.

For the foregoing reasons, the instant petition is DENIED and this action is hereby DISMISSED.

GEORGE C. SMITH
United States District Judge

Effective Date:September 10, 1996

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

INTERIM PROCESSING GUIDELINES FOR CERTIFICATES OF APPEALABILITY UNDER 28 U.S.C. § 2253 AND FOR MOTIONS UNDER 28 U.S.C. § 2244

The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §§ 101-107, 110 Stat. 1214, 1217-26 (Apr. 24, 1996), amended 28 U.S.C. §§ 2244, 2253, 2254, 2255, and Fed. R. App. P. 22, as well as other statutory provisions. Theses amendments set forth new procedures and requirements for both the filing and appellate processing of habeas corpus petitions. In order to provide some guidance to litigants, we set forth here interim procedures that the First Circuit Court of Appeals intends to follow in processing applications for certificates of appealability under 28 U.S.C. § 2253 and motions under 28 U.S.C. § 2244 for an order authorizing the district court to consider a second or successive application for relief under 28 U.S.C. § 2254 or § 2255.

I. APPLICATION FOR CERTIFICATE OF APPEALABILITY IN § 2254 AND § 2255 PROCEEDINGS.

A. RELEVANT STATUTORY PROVISIONS

1. Fed. R. App. P. 22(b).

Fed. R. App. P. 22(b), as amended by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 103, 110 Stat. 1218 (Apr. 24, 1996), now

provides as follows:

Rule 22. Habeas corpus and section 2255 proceedings

. . .

(b) CERTIFICATE OF APPEALABILITY.-- In a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court, an appeal by the applicant for the writ may not proceed unless a district or circuit judge issues a certificate of appealability pursuant to section 2253(c) of title 28, United States Code. If an appeal is taken by the applicant, the district judge who rendered the judgment shall either issue a certificate of appealability or state the reasons why such a certificate should not issue. The certificate or the statement shall be forwarded to the court of appeals with the notice of appeal and the file of the proceedings in the district court. If the district judge has denied the certificate, the applicant for the writ may then request issuance of the certificate by a circuit judge. If such a request is addressed to the court of appeals, it shall be deemed addressed to the judges thereof and shall be considered by a circuit judge or judges as the court deems appropriate. If no express request for a certificate is filed, the notice of appeal shall be deemed to constitute a request addressed to the judges of the court of appeals. If an appeal is taken by a State or its representative, a certificate of appealability is not required.

2. 28 U.S.C. § 2253(c).

Section 2253(c), as amended by § 102 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub.

L. No. 104-132, § 102, 110 Stat. 1217 (Apr. 24, 1996), now provides as follows:

> (c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

B. PROCEDURE IN § 2254 and § 2255 PROCEEDINGS.

While there may be some ambiguity whether a prisoner seeking to appeal from the final order adjudicating a § 2254 or § 2255 petition should apply to the district court, the court of appeals, or both for a certificate of appealability, this court intends to require an initial application to the district court in both § 2254 and § 2255 proceedings. Once the district court acts upon the request for a certificate of appealability, the applicant must also apply to the court of

appeals for a certificate of appealability regardless whether the district court grants or denies the certificate. In adopting this two-step process as an interim measure, we do not now finally determine how any ambiguity in the amendments will be interpreted, but rather leave the matter for comment during the rule making process, 28 U.S.C. § 2071, or development in the course of litigation.

Effective June 5, 1996

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT TITLE VI. HABEAS CORPUS; PROCEEDINGS IN FORMA PAUPERIS

USCS Ct App 4th Cir, Local R 22 (a) (1996)

Local Rule 22 (a). Certificates of appealability

All applications for certificates of appealability shall bee accompanied by memoranda or informal briefs pursuant to Local Rule 34 (b), regardless of whether the petitioner is represented by counsel. An application for a certificate of appealability may be referred to a panel of three judges. If all the judges on the panel conclude that the certificate should not issue, the certificate will be denied; but if any judge of such panel is of the opinion that the applicant has made a substantial showing of the denial of a constitutional right, the certificate will issue. The certificate shall indicate which specific issue or issues satisfy the required showing. If the Court grants a certificate of appealability, it may thereafter affirm, reverse or remand without further briefing or direct full briefing and oral argument.

HISTORY: (Amended Dec. 1, 1995; June 5, 1996.)

Effective May 30, 1996

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT TITLE VI. HABEAS CORPUS; PROCEEDINGS IN FORMA PAUPERIS

USCS Ct App 7th Cir, Circuit R 22.1 (1996)

Circuit Rule 22.1 Certificates of Appealability

(a) The procedures of Fed.R.App.P. 22(b) apply to requests for certificates of appealability in actions under 28 U.S.C. @ 2255.

(b) Every request for a certificate of appealability must be made initially to a judge of the district court. If the district judge does not issue a certificate, the person requesting this court to issue one must include, with the docketing statement under Circuit Rule 3(c), a copy of the district court's order denying the request, together with a statement of reasons why this court should issue the certificate. An appellant who does not articulate reasons why a certificate of appealability should issue does not forfeit his opportunity to appeal. The court treats the notice of appeal as implying a request for a certificate of appealability. When the time for filing the statement of reasons has passed, the papers will be distributed to a panel of the court for decision.

(c) A district judge who concludes that the amendments to 28 U.S.C. @ 2253(c) prevent that court from acting on the request for a certificate of appealability should nonetheless state how the judge would have ruled, were the court authorized to take dispositive action.

HISTORY: (Added May 30, 1996.)

May 30, 1996 amendments. The May 30, 1996 addition of this rule was accompanied by the following comment:

Section 102 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. 104-132, extends the requirement of a certificate of probable cause (renamed "certificate of appealability") from litigation under 28 U.S.C. @ 2254 to collateral attacks under 28 U.S.C. @ 2255. The new 28 U.S.C. @ 2253(c) adds:

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

These requirements make it essential for the court of appeals to know what issues the appellant plans to raise. Circuit Rule 22.1(b) calls on the appellant to provide reasons why a certificate of appealability is in order. Although this rule preserves the court's ability to issue the certificate even if the prisoner does not provide reasons, it is hard to satisfy the requirements of the new @ 2253(c) in their absence.

Section 103 of the Act rewrites Fed.R.App.P. 22 to go with the new version of @ 2253. Unfortunately, Rule 22(b) deals only with certificates of appealability in cases under 28 U.S.C. @ 2254. Collateral review under @ 2255, mentioned in the caption of the new Rule 22, is not addressed in the rule's text. New Circuit Rule 22.1(a) fills the gap by using the standards of the national Rule 22(b) for

@ 2254 and @ 2255 cases alike.

The new @ 2253 (c) and Rule 22(b) are discordant in another way. The final paragraph of the former @ 2253 reads: "An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding . . . unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause." This has been replaced by: "Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals . . ." The deletion of any reference to "the justice or judge who rendered the order" could lead to the conclusion that the district judge is no longer entitled to issue a certificate. Yet Rule 22(b) includes this language: "If an appeal is taken by the applicant, the district judge who rendered the judgment shall either issue a certificate of appealability or state the reasons why such a certificate should not issue." This implied that "circuit justice or judge" in @ 2253 (c)(1) should be read as "(circuit justice) or judge" rather than "circuit (justice or judge)". Because some potential for doubt remains, however, the new Circuit Rule 22.1(c) calls on every district judge to take a position on the merits, even if the judge believes that the new @ 2253(c)(1) deprives the district court of the ability to issue a certificate. This approach was adapted from interim bankruptcy rules used when the power of bankruptcy judges to act on some matters was in doubt.

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

In re:

Procedures Regarding the Prison Litigation Reform Act and the Antiterrorist (sic) and Effective Death Penalty Act.

EMERGENCY GENERAL ORDER
FILED October 1, 1996

Before SEYMOUR, Chief Judge, PORFILIO, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, KELLY, HENRY, BRISCOE, LUCERO, and MURPHY, Circuit Judges.

Passage of the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 804, and the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, tit. I, § 104, requires new procedures in the courts of this circuit. The following standards and procedures shall be implemented immediately in all cases to which these statutes apply.

Pursuant to the Prison Litigation Reform Act, all prisoners bringing civil actions or appeals shall pay the full amount of the filing fee. 28 U.S.C. § 1915(b)(1).

Consequently, if the prisoner tenders no filing fee, or less than the full fee, when a notice of appeal is filed, the district court shall obtain sufficient information to determine the prisoner's eligibility for, and make the assessment of, a partial filing fee under the Act. If the prisoner has sufficient funds, the entire filing fee shall be assessed immediately. The partial fee determination must take place regardless of whether the prisoner's status was examined at the time the complaint or other initial pleading was submitted to the district court. The appeal should be processed and submitted to this court in the normal course, as required by Federal Rule of Appellate Procedure 3(d), without waiting for the determination of the prisoner's eligibility for paying less than the full filing fee. When the district court makes its determination it shall enter an order and send a copy to this court. If the in forma pauperis application reveals that the prisoner has no assets and no means to pay an initial partial filing fee, 28 U.S.C. § 1915(b)(4), the district court's determination order must reflect that finding.

The appellant shall authorize the custodian to deduct payments for the institutional account and the custodian will pay the assessment. Notice shall be given to this court if the prisoner does not provide the information required under the Act or does not authorize payment from his or her institutional account. Filing fee payments shall be made to the clerk of the district court pursuant to Fed.R.App.P. 3(e).

Under the amendments contained in the Antiterrorist (sic) and Effective Death Penalty Act, no appeal may be taken in either state habeas cases of federal 28 U.S.C. § 2255 proceedings unless a certificate of appealability issues. 28 U.S.C. § 2253(b). Section 2253 provides that certificates to appeal should be issued, if at all, by a circuit justice or judge. Recognizing the conflict between this statute and the language of Federal Rule of Appellate Procedure 22(b), to

achieve consistency within the circuit, this court directs the district courts to consider the propriety of issuing certificates of appealability in the first instance. Failure of the district court to issue a certificate of appealability within thirty days of filing the notice of appeal shall be deemed a denial.

If denied by the district court, petitioner-appellants will be required to brief any request for a certificate of appealability in this court and address the merits of their appeals at the same time. 10th Cir. R. 22.1. Respondent-appellees shall not file a brief until requested to do so by this court.

During the pendency of this order, the court will evaluate its effectiveness. The court invites interested parties to send written comments to the clerk of court. After evaluation, the court will decide whether the order should be vacated or whether its provisions should be incorporated into the rules of court.

ENTERED FOR THE COURT

Patrick Fisher, Clerk